# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>STEVEN L. LEONARD,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 63476-3-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: April 26, 2010 |

Grosse, J. — A criminal defense attorney's mistake during trial does not, by itself, create a conflict of interest between the attorney and the defendant. There must be a showing that an actual conflict of interest arose and adversely affected the attorney's performance before an alleged conflict will warrant relief. Because Steven Leonard has not made that showing here, and because his ineffective assistance of counsel claim fails, we affirm his convictions for rape of a child and promoting the commercial sexual abuse of a minor.

## FACTS

Based on evidence that Leonard had intercourse with 12-year-old C.V. and persuaded her to engage in prostitution, the State charged him with two counts of second degree rape of a child and one count of promoting commercial sexual abuse of a minor. Prior to trial, Leonard moved to exclude testimony that he was a known pimp under ER 404(b). The court reserved the issue for trial, but indicated it was inclined to allow testimony that Leonard characterized himself as a pimp during the charging period, but not testimony referencing his status in the past.

During opening statements, defense counsel told the jury they would hear evidence of what Leonard "does for a living. He doesn't pimp girls, he sells weed. He sells marijuana." The court ruled that these remarks opened the door to any statements, whether made before or during the charging period, in which Leonard characterized himself as a pimp. In an effort to eliminate appellate issues stemming from the remarks, the court proposed that Leonard be given a choice of declaring a mistrial or proceeding with trial.

Following a discussion with Leonard, defense counsel told the court that, contrary to her advice, Leonard had decided to proceed because he was satisfied with the jury and the way the case was going. The court then explained the potential effect of counsel's error to Leonard:

> I heard [counsel] essentially conceding that [C.V.] had committed acts of prostitution while you two were together, but that it was her decision, and that you did not promote it or essentially have anything to do with it.
>
> Just a second. And in my judgment, any self-characterization prior by you, if true, and when I say if true, if you actually said it, not if what you said was a true characterization of yourself, but if you indeed said it, and the finder of fact believes you said it, the next inference would be that, in fact, that was a correct characterization.
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> And that could be very helpful to the State to resolve the issue of whose decision was it for [C.V.] to commit acts of prostitution.

After a second discussion with counsel, Leonard told the court he wanted to proceed with trial. The court reiterated that proceeding would likely waive any issue regarding counsel's opening statement. Leonard indicated he

understood and still wanted to proceed. After confirming that Leonard's decision was against counsel's advice, the court proceeded with trial.

C.V. testified that she first met Leonard on January 9, 2008. She was 12 years old. Leonard was 23. Leonard convinced C.V. to perform fellatio on him. At Leonard's urging, she also had intercourse with his acquaintance, J.K. A short time later, she had intercourse with another of Leonard's acquaintances, M.H.

Later that evening, Leonard and C.V. had intercourse again and then spent the night at Amanda Pederson's apartment. During the next week, Leonard and C.V. had intercourse twice at Pederson's apartment and once in a shed behind an unoccupied residence. C.V. left a pink pair of panties in the shed and had to borrow a black pair from Pederson.

At some point, Leonard told C.V. they needed money and suggested she could make some by engaging prostitution. He told her how much money to charge and how to walk on the highway and look for customers. C.V. did not want to engage in prostitution but agreed to do it. She found a customer on Pacific Highway South and performed fellatio on him for $38. She bought some food and gave the rest of the money to Leonard.

In mid-January, C.V.'s uncle found her walking with Leonard and Pederson near Westlake Center. Police arrested Leonard the following day.

While in jail, Leonard wrote a letter to Pederson in which he urged her to

"come to court an (sic) lie for me [.]" In a letter to K.F., he suggested she could help him by saying that C.V. got his DNA (deoxyribonucleic acid) on her crotch by touching K.F.'s vagina and then touching herself. He also called Pederson and asked her to abduct C.V. and persuade her to "change her story[.]" In other calls, Leonard said he needed "to get these stories straight as I get ready for court," told Pederson to say that he "just jacked off [on C.V. and] fucked [someone else] in front of her," asked Pederson to retrieve a blanket and other items from the shed, and said it would not do any good to send C.V. out of state because "It's like if you put a gun in a plastic bag and you threw it in the water, that bag's going to pop back up and screw everything up."

DNA testing revealed C.V.'s genetic profile and the profile of an unknown male on the black panties C.V. borrowed from Pederson. The State's DNA expert excluded Leonard as the source of the male DNA on the black panties. C.V.'s and M.H.'s profiles were found on the pink panties C.V. left in the shed. Leonard's profile and an unknown female's profile were discovered on a blanket found in the shed. C.V. was excluded as a source of the female profile.

Several witnesses recounted circumstances indicating that Leonard was aware of C.V.'s age. Witnesses also testified that Leonard admitted being a pimp in the past.

Leonard testified in his own defense. He denied having sex with C.V. or involving her in prostitution. He also denied telling anyone he had been a pimp.

He acknowledged having three prior theft convictions as well as convictions for making a false statement to a public servant, attempted possession of stolen property, and animal cruelty.

ANALYSIS

Leonard contends his rights to counsel and due process were violated because his counsel had an actual conflict of interest. We disagree.

The constitutional right to counsel includes the right to conflict-free counsel.[1] To establish a violation of that right, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.[2] Leonard contends that when defense counsel created a basis for a mistrial in opening statement, she "was exposed to a claim of ineffective assistance or even malpractice" and her "interest in mitigating further damage to herself diverged with [his] interest in defending himself to the fullest extent." Our courts, however, have repeatedly held that bar complaints, lawsuits, and claims of ineffective assistance only create a *potential* conflict of interest.[3] There must be a showing that "'counsel actively represented conflicting interests[.]'"[4] Leonard

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[1] State v. Hatfield, 51 Wn. App. 408, 410, 754 P.2d 136 (1988).
[2] Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); State v. Dhaliwal, 150 Wn.2d 559, 571-73, 79 P.3d 432 (2003).
[3] State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986) (bar complaint); United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (threat of lawsuit); State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d 679 (1991) (ineffective assistance).
[4] Dhaliwal, 150 Wn.2d at 573 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d. 333 (1980)); State v. Martinez, 53 Wn. App. 709, 715-16, 770 P.2d 646 (1989).

has not made that showing.

Leonard claims his counsel pursued conflicting interests when she "declined to argue her own ineffectiveness in support of a mistrial and improperly ceded to [him] the decision whether to move for a mistrial." But counsel did not decline to argue her own ineffectiveness. In fact, she was ready and willing to do so and advised Leonard to seek a mistrial on that basis. And while counsel did leave the mistrial decision to Leonard, we see no basis to attribute that decision to counsel's alleged self-interest.[5] To the contrary, the record indicates that it was *the court's* idea to let Leonard decide whether to proceed or start the trial anew.[6] As counsel noted during the colloquy on the issue, Leonard could request a mistrial "[o]r *your Honor has given [him] the option* of essentially asserting to the Court that he's satisfied with this jury . . . and to continue along."[7]

In addition, as discussed below, it was not unreasonable to leave the decision to Leonard under the circumstances. Finally, the fact that counsel

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[5] The conflict necessary to require reversal must be readily apparent and will not be inferred. Martinez, 53 Wn. App. at 715; State v. James, 48 Wn. App. 353, 365-66, 739 P.2d 1161 (1987).

[6] The court stated in part:

> Unless your client recognizes the door's open, is satisfied with the way the case is going and wants to go forward, and he can certainly make that decision.
>
> He can say I like this jury, I like the way the case has gone, I'm -- I think my counsel's done a good job, despite what the judge has said, and I want to go ahead, he can do that.

[7] (Emphasis added.)

advised Leonard to request a mistrial based on her mistake in opening statements shows that she was acting in Leonard's interest, not her own. Leonard has thus failed to carry his burden of demonstrating a conflict of interest.

Leonard argues in the alternative that his counsel was ineffective for acquiescing in the court's proposal to let him decide whether to proceed or request a mistrial. To establish ineffective assistance of counsel, a defendant must overcome a strong presumption of effective assistance and bears the burden of showing both deficient performance and resulting prejudice.[8] Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness.[9] In assessing the reasonableness of an attorney's decision, we view it in the context of all the circumstances.[10]

Leonard claims his counsel "acted unreasonably in deferring to [his] decision to proceed with trial over her own more-informed judgment." It is not necessarily unreasonable, however, for counsel to consider or abide by the wishes of a defendant on strategic decisions.[11] In this case, certain circumstances made it reasonable to proceed despite counsel's errant remarks and to give Leonard that option. First, the trial court indicated at several points

[8] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[9] State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997).
[10] Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[11] In re Jeffries, 110 Wn.2d 326, 332-34, 752 P.2d 1338 (1988).

that, regardless of counsel's error, it might ultimately admit evidence that Leonard referred to himself as a pimp. Thus, declaring a mistrial would not necessarily avoid the introduction of the prejudicial evidence. Second, while the "pimp" evidence was damaging to the defense on the promoting commercial sexual abuse charge, counsel could reasonably conclude that it would have far less impact on the more serious rape counts. Third, and most significantly, counsel could have concluded that the jury composition was very favorable to the defense and made it reasonable to proceed despite the risks.

In these circumstances, and in light of the strong presumption of effective assistance of counsel, we conclude Leonard has not demonstrated deficient performance. Accordingly, his ineffective assistance claim fails.

Finally, Leonard argues in his pro se statements of grounds for relief that the prosecutor committed misconduct and solicited false testimony by allegedly asking C.V. to amend her statement to police shortly before trial. He also argues that his trial counsel was ineffective for failing to challenge the amendments and/or bring them to the jury's attention, and that he was denied due process by the lateness of the amendment. These claims are based on matters, including documents attached to Leonard's filings, that are not part of the record on appeal. Accordingly, they must be raised in a personal restraint petition.[12] Leonard's filings otherwise raise no meritorious issues.

[12] See McFarland, 127 Wn.2d at 335.

Affirmed.

Grosse, J.

WE CONCUR:

Cox, J.

Spearman, J.